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MINUTES
APRIL 1, 2005

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:07 a.m., on Friday, April 1, 2005, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Robin Shropshire, Bill Rossbach, Gayle Skunk Cap, Kim Lacey (via telephone) and Don Marble

Board Attorney Present: Tom Bowe, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Richard Opper, Director; Tom Livers, Deputy Director; Tom Ellerhoff, Director's Office (Dir); John North, Dir, Legal (Leg); James Madden, Dir, Leg; Jane Amdahl, Dir, Leg; Keith Jones, Dir, Leg; Ed Hayes, Dir, Leg; David Rusoff, Dir, Leg; Norman Mullen, Dir, Leg; John Arrigo, Enforcement Division (Enf); Frank Gessaman, Enf; Steve Welch, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Rachel Clark, Public Water Supply Bureau (PWS), PCD; Eugene Pizzini, PWS, PCD; Jon Dilliard, PWS, PCD; John Camden, PWS, PCD; Jan Brown, Air Resources Management Bureau (ARM), PCD; Debra Wolfe, ARM, PCD; Debbie Skibicki, ARM, PCD; Vicky Walsh, ARM, PCD; Don Vidrine, ARM, PCD; Charles Homer, ARM, PCD; Bonnie Lovelace, Water Protection Bureau (WP), PCD; Kari Smith, WP, PCD; David Bowers, Hazardous Waste Site Cleanup Bureau, Remediation Division; Christian Levine, Water Quality Planning Bureau, Planning, Prevention & Assistance Division

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): J. Chris Pfahl, ASARCO; Bill Connors, Centennial; Bud Clinch, Montana Coal; Darcy Neigum, Centennial Power; Dan Hoven, BKBH; Harmon Ranney; Tammy Brendel, Atlantic Richfield; Betsy Welton, Atlantic Richfield; Anne Hedges, Montana Environmental Information Center (MEIC); Jennifer Hendricks, MEIC

I.A.

Review and approve minutes of January 28, 2005, meeting.

Chairman Russell called for a motion to approve the minutes. Mr. Rossbach so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.A.1.a In the matter of CR Kendall Corporation, BER 2002-09 MM.

Mr. Bowe had nothing to add to the summary contained in the agenda.

II.A.1.b In the matter of Flying J Petroleum, Inc., BER 2003-14 HW.

Mr. Bowe said the parties have been involved in extended negotiations.

II.A.1.c In the matter of Lang Creek Brewery, BER 2004-13 WQ.

Mr. Bowe had nothing to add to the information provided in the agenda.

II.A.1.d In the matter of the City of Lewistown, BER 2004-15 WQ.

Mr. Bowe said the contested case process is underway and that a hearing would likely be held in October or November this year.

II.A.1.e In the matter of Nature View Estates, BER 2004-16 SUB.

Mr. Bowe said he had set a schedule and a hearing was to begin August 25.

II.A.1.f In the matter of MPDES General Permit No. MTR04000, BER 2004-18 WQ.

Mr. Bowe said that both the DEQ and the seven cities had filed motions for summary judgment. He said the attorney for the cities had requested a hearing in person for Mr. Bowe to receive argument on their summary judgment motions and that it was scheduled for April 5.

II.A.1.g In the matter of Westmoreland Resources, Inc., BER 2005-01 SM.

Mr. Bowe had nothing to add to the information contained in the agenda.

II.A.1.h In the matter of Crystal View Estates, BER 2003-05 SUB.

Mr. Bowe provided information on the background of the case, saying the Board had concurred with his proposed decision to uphold DEQ's revocation of the certificate of approval of the proposed subdivision. He explained that Crystal View Estates filed for judicial review of the Board's decision and that a State District Court Judge in Kalispell has now upheld the Board decision.

II.B.1 In the matter of a briefing relating to the Upper Blackfoot Mining Complex.

Mr. Pfahl distributed a Power Point document and provided background on the mine site: the site was named a state CECRA site in the early 1990s and ASARCO and ARCO were named the responsible parties; ASARCO and ARCO began the voluntary reclamation program in 1993; ASARCO petitioned for the adoption of temporary water quality standards in 1999; the temporary standards were granted in June 2000 and are set to expire May 31, 2008; ASARCO signed an Administrative Order on Consent (AOC) with the US Forest Service in February 2003, which extended the implementation plan schedule under the temporary standards to 2010.

Mr. Pfahl said the water and soil were tested for arsenic, but that it was not an issue at the Carbonite site. He said the main source of metals in the Upper Blackfoot was the Mike Horse Adit. Mr. Pfahl informed the Board of the schedule of activities planned for 2005-2010 and discussed the tailings impoundment, which he said was being studied under the EE/CA process under an AOC with the Forest Service.

Chairman Russell clarified the Board's role with regard to the temporary standards.

Mr. Levine discussed how the temporary standards were set, and exceedances of those standards. He said the work was slow in the beginning due to ASARCO and the Forest Service working out the AOC, but things are now progressing as envisioned by the implementation plan.

Chairman Russell requested the Department and ASARCO provide more copies of packets they had submitted in the past concerning the Upper Blackfoot Mining Complex for the benefit of the new Board members.

Discussion took place regarding the data summary report, impacts to marine and wildlife, and the status of the dam. Chairman Russell requested another briefing on this subject at the next meeting if time allows.

II.B.2 In the matter of a briefing concerning recent legislative and regulatory developments regarding mercury and other air pollutants.

Mr. Homer explained that since the last Board meeting, there had been a lot of legislation and rule issues with regard to electrical generating units, in particular the mercury emissions from them. He explained about the Bush Administration's Clear Skies legislation, which proposed to implement a cap and trade program for SO₂ and NO_x from electrical generating units. He said that in March 2005, the Clear Skies Act was rejected by the Senate Environment and Public Works Committee, and as a result the EPA promulgated two administrative rules: the Clean Air Interstate Rule or CAIR (designed to reduce interstate transport of SO₂ and NO_x and help states attain the ozone standards and PM_{2.5} standards) and the Clean Air Mercury Rule, or CAMR (establishing a nationwide two-phase cap and trade program for new and existing coal-

fired electric steam generating units). He provided more details about the CAIR and CAMR and lengthy discussion took place.

Mr. Ellerhoff provided information regarding the toxic release inventory program.

Mr. Rossbach mentioned that former Board member Dr. Garon Smith has been making a presentation about mercury and the mercury rules to his chemistry classes and said it might be of interest to the Board.

III.A.1 In the matter of final action on the amendment of rules at ARM 17.38.106 pertaining to the collection of fees for plan and specification review.

Mr. Pizzini said the Department proposed these amendments to update existing rules regarding public water supplies by making the rules consistent with the law. He said the 1999/2000 legislative audit identified that the Department does not fully recover its costs in reviewing public water supply plans and specifications for drinking water and wastewater treatment systems as required by law. He said the 2001/2002 legislative audit again identified the lack of appropriate fees. He said for Fiscal Year 2004, the Department collected \$113,000 less in fees than it cost to complete those reviews.

Mr. Pizzini said a public hearing was held January 14, 2005, and that no member of the public attended the hearing. He said electronic comments were received on the rulemaking, but that they were not applicable to the proposed rule changes. Mr. Pizzini said two comments of concern were received and that the Department had proposed changes to address those concerns. He said the Department recommends adoption of the proposed amendments with the changes identified in the draft notice of the amendment.

Discussion took place regarding some of the comments received concerning the logic behind some of the proposed fees.

Chairman Russell called for public comment on the matter. There was no response. He called for a motion to adopt the rule as amended, adopt the presiding officer's report, the responses to comments and the House Bill 521 and 311 analyses. Ms. Lacey so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.2 In the matter of final action on amendments to the state's rules pertaining to concentrated animal feeding operations (CAFOs).

Mr. Madden said the Department was recommending that the Board take no action on this rule today, because at the end of February a Federal Court decision came down that vacated sections of the federal rule on which the state rule is based. The intention of the state rule was to incorporate the federal rule, but the current status of the federal rule is uncertain. He said the Department was hoping to get some guidance from EPA before the June meeting as to whether any parts of the federal rule survived the court process.

Mr. Madden provided a brief summary of the status of Senate Bill 320, which was the CAFO legislation supported by the Montana Stockgrowers Association. The Bill freezes permit fees and requires the use of a general permit. He said the Bill had passed the Senate and went to the House, but was now stuck in committee by a tie vote.

Chairman Russell called for public comment on the rulemaking. No one responded.

- III.B.1 In the matter of final action regarding violations of the Montana Underground Storage Tank Act at Big Sky Truck Stop in Dillon, BER 2004-07 UST.

Mr. Bowe explained that this case was settled between DEQ and the owner of the truck stop.

Chairman Russell called for a motion to authorize the Chair to sign the Order of Dismissal. Mr. Rossbach so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.B.2 In the matter of final action regarding M&W Investment, Inc.'s appeal of two subdivision application non-degradation decisions and a deviation request denial, EQ #01-1457 & #00-1822.

Mr. Bowe said this case has been around for a long time because the parties agreed to an extended period of water quality monitoring. He said the parties have stipulated to dismissal because they had reached a settlement.

Chairman Russell called for a motion to authorize the Chair to sign the Order of Dismissal. Mr. Rossbach so MOVED. Mr. Skunk Cap SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.1 In the matter of the appeal of Darwin Simac d/b/a Jackson Creek Saloon, BER 2005-05 PWS.

Mr. Bowe explained that the Notice of Violation and Administrative Compliance and Penalty Order, the First Prehearing Order and the Second Prehearing Order were included in the Board's packets. He said the hearing is scheduled for August 23, 2005.

Chairman Russell called for a motion to appoint Tom Bowe the permanent hearing examiner for this case. Ms. Lacey so MOVED. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.2 In the matter of the appeal of Bar S Livestock, BER 2005-06 WQ.

Mr. Bowe said he had issued first and second prehearing orders and that the hearing is scheduled for October 5, 2005.

Chairman Russell called for a motion to appoint Mr. Bowe the permanent hearing examiner. Mr. Skunk Cap so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.C.3 In the matter of the appeal by Save Rite South in Libby, BER 2005-07 UST, and Save
- III.C.4 Rite West in Libby, BER 2005-08 UST.

Mr. Bowe explained that these cases involve two different gas stations that have the same owner. He said he had granted an extension of time for filing a proposed schedule in the first case, giving the parties until the end of April to either settle the case or to propose a schedule.

Chairman Russell called for a motion to appoint Mr. Bowe permanent hearing examiner in both cases. Mr. Rossbach so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.D.1 In the matter of the appeals of Air Quality Permit No. 3185-02 granted to Rocky Mountain Power, Inc. for the Hardin Generation Project, BER 2005-02 AQ, BER 2005-03 AQ & BER 2005-04 AQ.

Chairman Russell took a roll call of the parties; Mr. Eggers was not present. Ms. Hendricks said that Mr. Eggers had another commitment.

Mr. Bowe provided background information regarding the Stipulation to Dismiss the Tribal Sovereignty Claim, MEPA Claim and Constitutional Claim. He recommended that the Board approve the stipulation.

Chairman Russell called for a motion to approve the Stipulation to Dismiss the Tribal Sovereignty Claim, MEPA Claim and Constitutional Claim. Mr. Rossbach so MOVED. Mr. Marble SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Mr. Bowe discussed the status of the request for stay of the decision of DEQ to amend the permit. He said none of the parties had submitted briefs in support of the request for stay. Discussion continued regarding a stay, whether construction had commenced, and that Rocky Mountain Power would not use commenced construction as an argument why the permit should not be changed.

Mr. Bowe addressed Rocky Mountain Power's Motion for Partial Summary Judgment. He explained the process and said briefing was not yet complete. He said the motion brought up some issues that weren't raised in the appeal, which could affect the jurisdiction of the Board to consider such new issues.

Mr. Bowe discussed the Motion for Late-July Hearing Date. He said DEQ has questioned whether the hearing could be conducted in two days and that a total of 22 expert witnesses had been disclosed. He named issues that had proven problematic in the past: order of evidence presentation, burden of proof and standard of proof.

Discussion took place regarding the number of witnesses, cumulative testimony, the claims and defenses, and possible future summary judgment motions. Also discussed was scheduling for submittal of summary judgment motions and briefs. A proposed schedule was discussed: all motions to be filed by April 25; reply briefs to be filed with the Board Secretary by May 18; the Board to hear argument on the motions and decide them at the June 3 meeting; the contested case hearing to begin July 27 with the expectation that it will last two long days.

Mr. Marble MOVED to accept the proposed schedule. Mr. Skunk Cap SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Discussion took place regarding the order of presentation, the burden of proof, the final prehearing order to be prepared by Mr. Rusoff, and the exhibits. Mr. Bowe said he would issue an order, which would include the dates for the schedule, following this meeting. It was made clear that the decisions made here also applied to Mr. Eggers, who was not present.

IV. General Public Comment

Chairman Russell opened the floor for general public comment. No one responded.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Shropshire so MOVED. Mr. Skunk Cap SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 1:30 p.m.

Board of Environmental Review April 1, 2005, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE